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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1479

CONSOLIDATION COAL COMPANY,

Petitioner

v.

SOUTH-EAST COAL COMPANY,

Respondent

REPLY BRIEF ON BEHALF OF PETITIONER, CONSOLIDATION COAL COMPANY

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TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Argument	3
A. Reply in Support of Consol's Reasons No. 1 and No. 2 for Granting the Writ	3
B. Reply in Support of Consol's Reason No. 3 for Granting the Writ	13
C. Reply in Support of Consol's Reason No. 4 for Granting the Writ	13
D. Reply in Support of Consol's Reason No. 5 for Granting the Writ	14
Conclusion	16

TABLE OF AUTHORITIES

CASES

Allen Bradley Co. v. Local Union, 325 U.S. 797 (1945)	11
Allen Bradley Co. v. Local No. 3, I. B. of E. Workers, 51 F. Supp. 36, 41-42 (S.D.N.Y. 1943)	11
Eastern R. R. Conference v. Noerr Motors, 365 U.S. 127 (1961); *reh. denied,* 365 U.S. 875 (1961)	13
Goodyear Tire & Rubber Co., et al. FTC, CCH TRR ¶ 19,522	12
International Union, United Mine Wkrs. of Am. v. N.L.R.B., 399 F.2d 977 (D.C. Cir. 1968)	10
International Union, United Mine Workers of America, et al. and Dixie Mining Company, 188 NLRB No. 121, 1971 CCH NLRB ¶ 22,787 (1971)	10
Interstate Circuit v. United States, 306 U.S. 208, 227 (1939)	12
Lewis v. Pennington, 257 F. Supp. 815 (E.D. Tenn. 1966); affirmed, 400 F.2d 806 (6th Cir. 1968); *cert. denied,* 393 U.S. 983 (1968)	4-5, 10

Table of Contents.

CASES PAGE

Ramsey v. United Mine Workers, 265 F. Supp. 288 (E.D. Tenn. 1967); *affirmed by an equally divided Court,* 416 F.2d 655 (6th Cir. 1969); *reversed and remanded on other grounds,* 39 U.S.L.W. 4245 (1971) 4, 8-9, 10, 11, 13

Tennessee Consolidated Coal Co. and Grundy, et al. v. United Mine Workers, 416 F. 2d 1192 (6th Cir. 1969); *cert. denied,* 397 U.S. 964 (1970) .. 4

Theater Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1953) 12

Trucking Unlimited v. California Motor Transport Co., 432 F.2d 755 (9th Cir. 1970) 13

United Mine Workers v. Pennington, 381 U.S. 657 (1965) 4, 8, 9, 11, 13

W. A. Boyle, et al. and Arthur J. Galligan, 179 NLRB No. 80, 1969 CCH NLRB ¶ 21,336 (1969) 10

Woods Exploration & Producing Company, Inc. v. Aluminum Company of America, Nos. 28763 and 29487 (5th Cir. January 5, 1971) 13

STATUTES

Clayton Act.....2, 9

Labor Management Relations Act, 1947 (Taft-Hartley Act) 2

Section 1 (29 U.S.C. §141) 2

Section 101 (29 U.S.C. §151) 2

Norris-La Guardia Act 2, 9, 13

Section 6 (29 U.S.C. §106) 13

Sherman Antitrust Act.....6-7, 9

Section 1 (15 U.S.C. §1) 6-7

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Preliminary Statement

The basic error in Respondent's Brief in Opposition is that it completely ignores the fact that this case involves complex issues relating to the interplay of the national labor policy and the national antitrust policy. In this respect, Respondent echoes and reflects the attitude of both the District Court and the Court of Appeals for the Sixth Circuit in this case.

Respondent's Brief in Opposition and the action of the Courts below are founded upon the mistaken proposition that this case essentially involves only the application of the antitrust laws. Not once in the charge of the District Court was any mention made of the *duty of an employer or group of employers to bargain collec-*

tively in good faith with a Union to attempt to arrive at an agreement. This omission especially cries out for recognition in the face of the uncontradicted evidence that the alleged conspiracy here actually achieved the Congressionally-mandated purpose of the Labor Management Relations Act (29 U.S.C. §§ 141, 151) by achieving industrial peace in an industry which, during the Second World War, was seized five times by the United States Government in order to assure continued coal production (Jt. App. pp. 986-87).[1]

Despite detailed requests for instructions (Jt. App. 1749-50), the District Court never instructed the jury with respect to the employer's *duty* to bargain collectively and arrive at an agreement, never mentioned the relevant Federal labor statutes, but merely indicated, negatively, that under the Clayton Act and "the LaGuardia Act" [sic] it was *not unlawful* for Unions and employers to bargain collectively (App. C. pp. 87a, 88a). This was, at best, a singularly odd way to state a Congressionally-mandated policy.

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1. Herein, the indication, for example, to "Jt. App. pp. . . .", shall refer to the Joint Appendix in the United States Court of Appeals for the Sixth Circuit, which has been certified to this Court. Reference to the Appendices, for example, to "App. C. p. . .a" refers to the Appendices attached to Consolidation Coal Company's (hereinafter "Consol") Petition for a Writ of Certiorari filed herein.

ARGUMENT

A. Reply in Support of Consol's Reasons No. 1 and No. 2 for Granting the Writ.

This case was actually tried for the Respondent in the District Court on the theory that the Protective Wage Clause in the 1958 National Bituminous Coal Wage Agreement (hereinafter "NBCWA") amounted to a "strait jacket/boycott" agreement depriving the United Mine Workers of America (hereinafter "UMWA") of its freedom of action. The case was argued to the jury by Respondent's counsel on that theory (Jt. App. pp. 1786-89).

Despite detailed and alternative requests for instructions (Jt. App. pp. 1756-57) concerning the proper method of interpreting the Protective Wage Clause (hereinafter "PWC"), the District Court merely instructed the jury that the PWC (as well as the 80-cent clause which replaced it) was *legal,* but that if the agreement were entered into with the intent or *"if they had that in mind"* that it could have an adverse affect upon the Respondent, it would be a violation of the antitrust laws (App. C. pp. 91-92a). The Court of Appeals for the Sixth Circuit affirmed and made a forfeiture of exemption from the antitrust laws equal to a *per se* violation thereof (App. A. pp. 11-12a), all dependent on specific predatory intent (App. A. p. 9a), which it equated with *conscious knowledge* (App. A. p. 27a) of possible harm to a competitor.

Now the Respondent does not even attempt to reconcile that charge with the decisions of this Honorable Court but here takes the position that all that is necessary to impose liability is a finding of *predatory*

intent, without any underlying "strait jacket" agreement of the type discussed by this Court in *United Mine Workers v. Pennington*[2] and *Ramsey v. United Mine Workers.*[3] Moreover, this position wholly ignores the distinction between forfeiture of the exemption and establishment of an antitrust violation. This is a new *per se* violation with a vengeance.

[In this connection it may be noted that in the cases cited at page 4 of Respondent's Brief, the facts and issues were not the same as in the present case. In all of the cases cited, there was evidence of an attempt by UMWA to monopolize the [illegible] dence is contained in this record. Furthermore, in *Tennessee Consol*[4] the jury was given a special interrogatory with respect to their construction of the Protective Wage Clause and found it to be illegal. In this case the District Court instructed the jury that the provision was legal but could nevertheless be the foundation of an antitrust violation. Thus, the cases cited by Respondent do not support its contention.]

As a result of this Honorable Court's Opinions in *First Pennington* and *Ramsey,* as well as the decisions of the District Court[5] and the Circuit Court[6] in *Sec-*

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2. 381 U.S. 657 (1965); hereinafter "First Pennington." References to the Pennington case on remand are referred to as "Second Pennington"; see footnotes 5 and 6, infra.

3. 39 U.S.L.W. 4245 (1971); hereinafter "Ramsey".

4. Tennessee Consolidated Coal Co. and Grundy, et al. v. United Mine Workers, 416 F.2d 1192 (6th Cir. 1969); cert. denied, 397 U.S. 964 (1970).

5. 257 F. Supp. 815 (E.D. Tenn. 1966).

6. 400 F.2d 806 (6th Cir. 1968); cert. denied, 393 U.S. 983 (1968).

Argument.

issues should
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liability could
s case. These
was an agree-
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ond Pennington, three separate crucial issu
have been resolved by the jury, under appr
structions from the Trial Court, before liab
have been imposed upon defendants in this ca
issues were as follows: (1) whether there was
ment or equivalent commitment by UMWA
labor standards outside the bargaining
whether such a "strait jacket" agreement, if
made with the predatory intent or purpose
competitors out of business; (3) whether such
jacket" agreement, if found, was unreason
violation of the antitrust laws.

In the instant case, the Lower ent now
pletely ignored issues 1 and 3, and F case and the
seeks to vindicate the jury's result in t basis that a
rulings of the Lower Courts on the s of a plaintiff
partial resolution of issue No. 2 in fav the imposition
(Respondent here) is sufficient to justif against both
of over $7,500,000.00 of antitrust liabil co-conspirator
a Union and an employer named as a ndent argues
with the Union. In this regard, Res ry conspiracy
that a finding of an intentionally preda ient to justify
"behind the use of the NBCWA" is suff feited its ex-
a jury finding that the Union has hat the Union
emption from the antitrust laws, *and* or with it have
and the employer joined as a co-conspir antitrust laws.
committed a substantive violation of th

rgues, and the

Respondent's Brief in Opposition s case involved
Courts below acted, on the basis that th fendants acted
the single, simple issue of whether the on page 37 of
with "predatory intent". For example

its Brief, Respondent states that ". . . the single theory presented here was the intentionally predatory conspiracy behind the use of the NBCWA."

With respect to the issues in the case, the following statement on the Record by the Trial Court is pertinent:

> "My idea about these Instructions, you can just overinstruct a jury. This is a complicated matter and I think I can narrow it down and give a sharp issue to them to decide. * * * It is easy to get confused on many things in a long case." (Jt. App. pp. 1526-27).

The jury was instructed (Appx. p. [illegible]):

> "As I said before, I don't want you to think because of this length of time that we have had to try this case, the number of witnesses and the number of exhibits, and the number of figures, the hundreds of figures used here, and the testimony that has been read here for hours at a time from transcripts and from depositions, that you are so confused that you don't know what it is all about. It does sound like such a magnanimous big operation that it is hard to find out. But *the issue* in this case, notwithstanding all of that, is very, very sharp. I assure you that before you go out of that jury box that you will understand what it is you have to decide." (Emphasis supplied.)

This *was* a complicated matter. It was a case involving the national labor policy, the labor exemption from the antitrust laws and basic and fundamental considerations of the antitrust laws themselves. It allegedly involved a charge of restraint of trade under Section 1

of the Sherman Act. It also involved the construction of PWC (even though the Courts Below and Respondent now attempt to disavow that), and the rules of construction of contracts.

In an effort to compress all aspects of the case into the *so-called* single, "sharp issue", the District Court and Respondent confused "agreement" with "predatory intent". The District Court asserted (App. B. pp. 63-64a) that its charge ". . . presented to the jury *a sharp, clear issue for their determination.*" [Emphasis supplied.] The statements that there was *"a* sharp, clear issue" [emphasis supplied] and *"the issue* . . . is . . . sharp" [emphasis supplied] are tracked by the Respondent's present contention that the *only* issue involved was that of "predatory intent". When the District Court asserts that there is only "*a* sharp, clear issue" [emphasis supplied] and *"the issue* . . . is . . . sharp," [emphasis supplied], and that issue is "predatory intent" and that is coupled with the Court's instruction that the collective bargaining agreement itself was legal, it is evident that grievous error has been committed, especially when "conscious knowledge" is equated with "intent".

This approach is also expressly set forth in the Opinion of the Sixth Circuit where the Circuit Court held that if a legal and valid collective bargaining agreement were entered into with the " . . . *conscious knowledge* or intent that it would be used to drive competitors out of business . . . , then a violation of the antitrust laws has occurred." (App. A. p. 27a). (Emphasis supplied.)

No matter how this concept is presented, what it amounts to *is* that a legal and valid collective bargaining agreement entered into in compliance with the Congressionally-mandated labor policy may be found to be the basis of a Union's forfeiture of its exemption from the antitrust laws *and* a substantive *per se* antitrust violation merely because of "conscious knowledge" of potential harm to a competitor of one of the parties.[7]

It is respectfully submitted that such a result was never intended by this Honorable Court and — if allowed to stand — will seriously and adversely affect the future of collective bargaining throughout the country. Every employer or group of employers and every union will have to bargain to impasse in order to attempt to avoid potential antitrust liability. The fear of antitrust liability will frustrate the march—vigorous or halting—towards industrial peace.

In the Opinion of Mr. Justice White in *Ramsey,* it was pointed out that petitioner therein was asking this Court to reconsider its holding in *First Pennington* and

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7. An outstanding example of the impact of permitting a legal agreement to be used as the foundation of an antitrust violation is pointed up at pages 13 and 14 of Respondent's Brief in Opposition. There Respondent argues that Consol "boycotted" South-East Coal Company. Respondent also contends that Paragraph B of PWC was an "illegal boycott" agreement. Yet this is the same paragraph which has been stated by *both* the District Court and the Court of Appeals to be *legal.*

So compliance with the legal agreement is — according to Respondent's Brief in Opposition — evidence of illegality. That the lower Courts here permitted and approved such a result is grounds for granting a writ of certiorari.

other cases that *unilateral conduct* by the Union of the type protected by the Clayton and Norris-LaGuardia Acts does not violate the Sherman Act even though it may restrain trade. 39 U.S.L.W. 4245, at 4248. This Honorable Court specifically declined to reconsider that issue in *Ramsey*. Insofar as Respondent herein is really contending that a finding of intent or purpose—which may be derived from "conscious knowledge" of possible harm to a competitor—is sufficient to impose liability even in the absence of a so-called "straight jacket" agreement by the Union, it would appear clear that Respondent is asking this Court once again to reconsider and impliedly recognize the principle that unilateral conduct by the Union—if accompanied by an improper motive or intent, which, in turn, can be derived from "conscious knowledge" of possible harm to a competitor —may violate the Sherman Act.

Realistically, every "first target" employer *knows* he establishes a pattern. If Respondent prevails herein, labor chaos will be the inevitable result.

The denial of a writ of certiorari in this case would, therefore, amount to an implied reversal of this Honorable Court's rulings in *First Pennington* and *Ramsey* with respect to unilateral action on the part of a labor union. It would also constitute a recognition by this Court of the Circuit Court's unwarranted and improper holding that forfeiture of the labor exemption from the antitrust laws is to be equated with a substantive violation of the antitrust laws, thus eliminating any separate consideration by the fact-finder of such issues as the well-recognized rule of reason.

Argument.

It is believed urgently necessary for this Court to determine whether a forfeiture of exemption from the antitrust laws and a *per se* violation of the antitrust laws can be justified on the basis of a finding of predatory intent or purpose with respect to an admittedly legal agreement which arises out of a Congressionally-mandated duty to bargain and relationship between the parties to that legal agreement. It is also necessary to determine whether "conscious knowledge" of potential harm to a competitor supplies the requisite intent.

It is to be borne in mind here that the District Court specifically held that the Protective Wage Clause of the NBCWA was legal (App. C. p. 91a). It is also to be borne in mind that all legal and administrative tribunals which have passed on this question have determined that both PWC and the subsequent 80-cent clause are legal.[8]

To the extent that this Honorable Court has characterized a collective bargaining agreement entered into

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8. Ramsey v. United Mine Workers, 265 F. Supp. 388 (E.D. Tenn. 1967); affirmed by an equally divided Court, 416 F.2d 655 (6th Cir. 1969); reversed and remanded on other grounds, 39 U.S.L.W. 4245 (1971); Lewis v. Pennington, 400 F.2d 806 (6th Cir. 1968); cert. denied, 393 U.S. 983 (1968); International Union, United Mine Wkrs. of Am. v. N.L.R.B., 399 F.2d 977 (D.C. Cir. 1968); W. A. Boyle, et al. and Arthur J. Galligan, 179 NLRB No 80, 1969 CCH NLRB ¶ 21,336 (1969); and International Union, United Mine Workers of America, et al. and Dixie Mining Company, 188 NLRB No. 121, 1971 CCH NLRB ¶ 22,787 (1971).

The District Court *never even read* PWC to the jury —but read the 80-cent clause (App. C. p. 94a), which is *not* the basis of the Respondent's claim.

between a Union and an employer or group of employers, Petitioner Consol submits that this Honorable Court has said (*First Pennington* and *Ramsey*) that where a Union, by agreement with one set of employers insists on maintaining in other bargaining units specified wage standards ruinous to the business of those employers, such agreement *is not exempt from the antitrust laws.* Whether or not such a "strait jacket" type of agreement—which deprives the Union of its freedom of action —amounts *only* to a forfeiture of exemption, it is clear that the basic agreement must be invalid in the sense of being a "strait jacket" agreement *before any other questions are raised*—such as "predatory intent", and "reasonableness".

This Honorable Court, in *Allen Bradley,*[9] affirmed the Lower Court's holding that the Union had conspired in violation of the antitrust laws. However, it is to be noted that in that case the District Court had concluded specifically and separately that the Union's actions and activities therein were not exempt from the antitrust laws and also that the Union's action constituted a violation of the antitrust laws. In this regard, this Honorable Court's attention is invited to paragraphs 5 and 23 of the conclusions of law stated in the Opinion of the District Court in *Allen Bradley,* 51 F. Supp. 36, at 41-42 (S.D. N.Y. 1943). It is evident, therefore, that the Lower Courts, in *Allen Bradley,* separately considered the issue of exemption and the issue of a substantive violation, unlike the Lower Courts in the instant case, and that no new *per se* violation was intended or declared in that case.

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9. Allen Bradley Co. v. Local Union, 325 U.S. 797 (1945).

Argument.

By equating a forfeiture of Union exemption with a *per se* substantive violation of the antitrust laws, the Lower Courts in this case have deprived Petitioners herein — and others — of any opportunity to have the fact finder determine whether the alleged acts and conduct of the parties constituted a substantive violation of the antitrust laws. For this reason alone, certiorari should be granted by this Honorable Court.

The actions of the Courts below in ignoring the distinction between the forfeiture of the labor exemption from the antitrust laws and the violation of those laws were made worse by their equation of "having in mind" and having "conscious knowledge" that a legal collective bargaining agreement could harm a competitor with an actual agreement constituting a *per se* violation.

In this respect Respondent's answer is to cite and quote (p. 41 of Respondent's Brief) from the case of *Interstate Circuit v. United States,* 306 U.S. 208, at 227 (1939). However, that case has been discredited or severely limited by *Theater Enterprises, Inc. v. Paramount Film Distributing Corp.,* 346 U.S. 537 (1953). If there is some area of confusion with respect to the teaching of those two cases, then clearly the attention of this Court is merited and certiorari should be granted.[10]

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10. Despite the teaching of this Honorable Court in Theater Enterprises, Inc., it would appear that the doctrine of "conscious parallelism" is still being utilized (see, e.g. Goodyear Tire & Rubber Co., et. al. F.T.C., C.C.H. T.R.R. ¶ 19,522.) and merits the attention of this Honorable Court.

B. Reply in Support of Consol's Reason No. 3 for Granting the Writ.

The significance of the *Noerr-Pennington*[11] cases is that the actions there called into question were admittedly legal and a predatory intent was not permitted to stigmatize them. That this issue is very much alive today and worthy of this Court's consideration and guidance is attested by the following cases in various parts of the country which have presented very similar issues: *Woods Exploration & Producing Company, Inc. v. Aluminum Company of America,* Nos. 28763 and 29487 (5th Cir. January 5, 1971); and *Trucking Unlimited v. California Motor Transport Co.,* 432 F.2d 755 (9th Cir. 1970).

C. Reply in Support of Consol's Reason No. 4 for Granting the Writ.

In *Ramsey,* supra, this Court held that the "clear proof" rule in Section 6 of the Norris-LaGuardia Act (29 U.S.C. §106) applies both to employee and employer organizations. 39 U.S.L.W. at 4247, note 8. In this case, the Circuit Court held that the "clear proof" rule applies only to labor organizations and not to employer defendants, such as Consol (App. A. pp. 6-7a). For this reason alone, a writ of certiorari should be granted to review the judgment of the District Court and the Circuit Court in this case.

The Brief filed in Opposition ignores completely the obvious inconsistency between the Circuit Court's ruling in this case and this Court's holding in *Ramsey.*

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11. Eastern R.R. Conference v. Noerr Motors, 365 U.S. 127 (1961); reh. denied, 365 U.S. 875 (1961); and United Mine Workers v. Pennington, supra.

D. Reply in Support of Consol's Reason No. 5 for Granting the Writ.

It is appropriate to advert to the Respondent's assertion (Respondent's Brief, p. 40) that Petitioner Consol has taken portions of the District Court's charge out of context. As to this, Petitioner Consol reiterates its urgent request that this Honorable Court examine the Court's charge in toto (The charge of the District Court is set forth in full in Appendix C to Consol's Petition filed herein, at pp. 69-104a).

The fundamental errors contained in that charge cannot be swept aside by either the District Court's own attempt to apologize for its admitted errors (App. B. pp. 63-64a), nor the argument of Respondent (Respondent's Brief p. 53) that "[f]laws can be found in almost any charge by separating certain paragraphs from the whole." Here, perusal of the charge will demonstrate that flaws were the rule rather than the exception.

A few examples may be noted. In a case where there was no evidence or contention of monopoly, the charge contained instructions with respect to monopoly (App. C. pp. 83a, 85a, 86a, 91a, 95a). In a complex case involving the interplay of the national labor policy and the national antitrust policy, the jury was instructed that it could decide the case based upon the *"atmosphere"* (emphasis supplied) of the case (App. C. pp. 76-77a) and also told to take a "common-sense approach to the case" (App. C. pp. 76-77a, 92a, 102a). The jury was also specifically instructed as follows:

> "You are to get an idea from the whole picture of this thing that this case should be decided one way

rather than another. Now, that is a common-sense approach to it." (App. C. p. 77a).

The District Court also charged the jury as follows (App. C. p. 92a):

> "I don't know whether I have given you the definition of a conspiracy or not. I have it here some place; anyway, I will give it to you. If I have to repeat it, I will ask your indulgence.
>
> "A conspiracy sounds like a legal term, a legalistic term. It is a common-sense, every-day word, as a matter of fact."

The instructions with respect to monopoly (App. C. pp. 83a, 85a, 86a, 91a, 95a), and the personalization of the Respondent company (App. C. pp. 81a, 101a), and the discussions with respect to eastern Kentucky (App. C. pp. 70a, 73a, 93a, 95a) all created an "atmosphere" prejudicial to the defendants in this case.

It is typical of the manner in which the case was permitted to be tried by the District Court and the manner in which the case was presented to the jury by the District Court in its charge, and the manner in which it was reviewed by the United States Court of Appeals for the Sixth Circuit, that the bulk of Respondent's Brief is devoted to a one-sided discussion of evidentiary details typical of a closing argument or a brief in opposition to a motion for judgment n.o.v.

Consol does not acquiesce in Respondent's argumentative and partisan alleged statement of facts. Although a detailed counter-statement of facts is not believed appropriate, Consol, as examples, does call attention to the fact that Respondent's statement that

Conclusion.

Consol organized and controlled the Bituminous Coal Operators Association (hereinafter "BCOA") is unsupported by the record. More significantly, however, is the unwarranted inference that the formation of a multi-employer bargaining group to comply with the policies of the relevant Federal labor statutes is to be considered as evidence of an intent to conspire to violate the antitrust laws. Also as an example, Consol takes issue with Respondent's statement (Respondent's Brief pp. 11-12) that UMWA has not approved a single change in a single contract with a single coal operator since 1950, when BCOA was formed. The uncontradicted evidence is that since 1890 UMWA had been seeking to achieve one uniform contract for the entire coal industry; that the regional differentials previously existing between the northern and southern coal operators were completely eliminated in 1943 as a result of the report of the War Mediation Board; and that all wage increases negotiated by UMWA since 1943 have been "across the board" regardless of the region in which the coal operator was engaged. (Jt. App. pp. 477, 486-87, 1166-67).

CONCLUSION

Consol's Petition for a Writ of Certiorari was based upon five reasons:

1. The Courts below created a new *per se* antitrust violation by ignoring the distinction between the forfeiture of the labor exemption from the antitrust laws and the violation of those laws.

2. The Courts below equated "having in mind" or having "conscious knowledge" that a legal collective bargaining agreement could harm a competitor with an

actual agreement constituting a *per se* violation of the antitrust laws.

3. The Courts below held that an admittedly legal collective bargaining agreement could be the foundation for an antitrust violation if it was entered into with an anticompetitive intent.

4. The Courts below erred with respect to the "clear proof" rule.

5. The District Court's handling of various matters, and its charge, merited the exercise of this Court's supervision.

Respondent's Brief in Opposition actually corroborates the first three reasons set forth in Consol's Petition and hereinabove in this Conclusion. The Brief in Opposition does not adequately answer reasons 4 and 5 at all.

Petitioner Consol respectfully reiterates its request that the District Court's charge be examined.

Petitioner Consol also respectfully reiterates its request that a Writ of Certiorari be granted.

Respectfully submitted,

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